What Does *Citizens United* Mean for My Company and Its PAC? The Impact of the Supreme Court's New Campaign Finance Ruling

by Karl S. Myers

The Supreme Court's high-profile campaign finance decision in *Citizens United v. Federal Election Commission (FEC),* handed down in January, has been followed by a number of bold statements about what it means and its implications for the future of campaign finance law. For many of those faced with the day-to-day aspects of campaign finance, including companies and their PACs, some degree of confusion has been created by the dialogue that has surrounded Citizens United. It is important, therefore, to understand the actual scope of the decision in order to assess its impact.

What Did the Court Decide?

In *Citizens United,* the Court made two determinations. The first is well-known in the public sphere, but the second – and perhaps more important – has prompted surprisingly little discussion.

1. **Using corporate funds for independent advertising** – The Court's first holding (by a 5-4 vote), stated generally, was that corporations must be allowed to use their general treasury funds to engage in "independent" television and radio advertising, within certain pre-election time frames, advocating either for or against the election of a particular federal candidate (a practice called "electioneering communication"). Previously, federal campaign finance law prohibited the use of corporate treasury funds in this manner.

While this is a significant decision, it is important to note its limitations. As indicated, the Court's decision relates to "independent" advertising – a term of art under federal campaign finance law meaning advertising that is not coordinated with any candidate's campaign. Advertising that is coordinated with a campaign (i.e., a situation where a campaign and company work together respecting the company's running of ads, either for the candidate or against the opponent) constitutes an in-kind contribution to a candidate, which is forbidden in the case of corporations.

Another important limitation on the Court's decision is the distinction between dollar amount limits on contributions to candidates versus outright bans on independent expenditures. While dollar limits on candidate contributions remain intact due to the corrupting or "quid pro quo" influence that can result from large, unlimited contributions by specific donors to particular candidates, the Court reasoned that the same problem is not present or is significantly attenuated respecting independent expenditures. Thus, the Court's decision does not speak to, or indicate the possible demise of, limits on contributions to individual candidates.

2. **Disclosures and disclaimers for independent advertising** – The Court's second holding (by an 8-1 vote) is arguably more significant than the first, yet it has garnered little attention. The Court specifically upheld requirements that corporations making independent expenditures must disclose such expenses to the Federal Election Commission – which, in turn, discloses them to the public. Further, the Court upheld federal requirements that any independent advertisements must include disclosures and disclaimers in the advertising itself. These requirements provide that the entity must take responsibility for the content of the advertising and state that the advertising is not authorized by any candidate.

This second holding is significant because the Court, by a nearly unanimous vote, has made a strong statement in favor of disclosure and transparency. These objectives are at the core of the FEC's function (as well as the function of counterpart state agencies across the country) and are keys to the goals of campaign finance law in general. A contrary ruling likely would have thrown disclosure and disclaimer law into disarray and probably would have had a significant impact on PAC operations.

What Impact Will *Citizens United* Have?

It is important to point out that the Citizens United ruling, standing alone, does not have a significant impact on corporations that do not make or intend to make independent advertising expenditures (the vast majority do not). Corporations still are banned from making direct contributions to federal candidates. Corporate PACs still remain subject to the same dollar limits on contributions to candidates and other PACs. And, as noted above, corporations still cannot coordinate advertisements with campaigns.

Citizens United also does not speak to PAC solicitation rules and regulations, including which employees may be solicited, and when and how they may be solicited. Existing regulations on these subjects are intact. Further, the decision has no effect on all PAC-related reporting requirements, including quarterly or monthly filings and pre- and post-election filings. Finally, Citizens United does not impact the broader field of political laws. It does not change treatment of issue advocacy (advocacy about an issue in the political arena but not tied to the election or defeat of a specific candidate). Nor should the decision have an effect on state-based "pay-to-play" restrictions on government contractors or on lobbying disclosure laws.

What Changes Might I See Going Forward?

It is difficult to predict what the Supreme Court and other courts will do as a result of Citizens United. As a preliminary matter, however, it seems clear that state or local prohibitions on the use of corporate treasury funds to engage in independent advertising are most likely unconstitutional. Moreover, new decisions from subordinate courts applying Citizens United indicate that other restrictions on those who engage in independent advertising activities (and their contributors) must or will be lifted. In Congress and in state legislatures, there has been some discussion of imposing new disclosure and disclaimer requirements, as well as shareholder approval requirements. It remains to be seen which, if any, of these proposals will take hold and have permanence. In any event, at a minimum, Citizens United should usher in a period of at least a modest narrowing of campaign finance law, particularly in the area of independent activities that are not coordinated with campaigns.

As for PAC officers, who handle the day-to-day of corporate PAC operations, they have found, and should continue to find, that little has changed in the wake of Citizens United. But given that the ban on independent advertising expenditures has been lifted, corporations and their PACs should expect to see an uptick in solicitations to contribute toward independent advertising carried out by others, whether it be other entities or trade groups. As an initial matter, these requests could present coordination issues, and therefore the decision-making process relating to independent expenditure contributions should be isolated from those who are in contact with candidates and candidate committees. But perhaps more important, these requests should be carefully considered and vetted because they could become public and have ramifications beyond the control of the corporation or PAC.

For instance, if in fact the funding request relates to candidate-specific advertising (as opposed to funding for general operations, such as trade group dues), the receiving entity may be required to publicly disclose the contributing company or PAC as among the sources of funding. So if presented with such a request, the company or PAC must decide if it is ready to accept the potential consequences of public disclosure –which could include adverse publicity and consumer or shareholder backlash. While some may embrace this possibility, others may not. The point is that each company or PAC should make a careful and informed decision before making such a contribution. ★

As a member of Stradley Ronon's Government & Public Affairs Practice Group, Karl S. Myers represents clients with respect to political law matters. Mr. Myers counsels entities and their political action committees (PACs) respecting PAC operations, provides campaign contribution advice, counsels government contractors affected by "pay-to-play" restrictions, provides counseling to clients respecting lobbying disclosure requirements, advises clients respecting casino gaming laws and regulations, and represents clients before relevant government agencies charged with implementing political and gaming laws. For more information, please contact Karl at 215.564.8193 or kmyers@stradley.com.

Regional Political and Gaming Law News

- In March, proposed campaign finance reform legislation was introduced in the Pennsylvania Senate. If enacted, the proposed legislation (Senate Bill 1269) would establish limits on individual, PAC, and political committee contributions. The proposed enactment also would require more detailed and frequent campaign finance reporting. This proposed legislation was introduced and co-sponsored by a bipartisan group of 17 Members of the Pennsylvania Senate.

- In January, legislation was enacted authorizing table games (blackjack, poker, etc.) at the Commonwealth's licensed casino facilities. The Pennsylvania Gaming Control Board is currently in the process of vetting and approving table games applications, with the expectation that these games will be running on the gaming floors by this summer. The legislation (Senate Bill 711) also restores the ban on political contributions by those holding certain gaming interests in Pennsylvania, which previously had been struck down by the Pennsylvania Supreme Court in April of 2009.

- In December, legislation became effective in Pennsylvania that prohibits those who seek to enter into or currently have professional services contracts with municipal pension systems from making certain political contributions and giving certain gifts within the two-year period prior to entering into the contract. The legislation (House Bill 1828) also requires certain contribution disclosures and other mandatory disclosures by those who intend to enter into these contracts. ■